perfect knowledge, and feel at this moment, that they are most excellent men of business. But from what we know of the circumstances, there seems to have arisen an irritation which overcame a little that impartiality and high position which public prosecutors must have. It is out of our power to take the case from the hands of the jury. I don't say that I would have concurred in their verdict, but we are not entitled to withdraw it from them. I think a little animus did come out a little in the adherence by Mr Morrison to his belief in Bell's guilt, after another person had been convicted. Without going into the cutting upon the street, which is like the biting of the thumb in "Romeo and Juliet," there are indications that when they lodged their defences there was great temper. I cannot look on the defences except as their defences. They did not repudiate them at the time, nor in this record, and it was only at the trial in this case that they tried to make out that they were not their defences. The record was closed with these statements in the defences, and they are now interpreted by the jury as accusing Bell of that most serious conspiracy. Now, as Lord Cowan has said, Mr Bell was committed on nothing but sending threatening letters, when these defences were lodged. When the record was closed, besides the confession of Edmiston, the Crown had not taken a step to follow up the other charge, and the Procurators-Fiscal, whose duty was as much to prosecute as to put these statements on record, had not taken one step. They could not have put them on record without the intention of proving them, or without a blindness to the course they were to follow, and no evidence would have been sufficient to prove them except what would have been sufficient in a criminal charge. That is the rule whenever the *veritas* has to be proved. To some extent the feelings of the defenders seem to have lost their balance, and the jury were entitled to consider that there was some evidence of malice. Then there was the letter shown to Nicholson. I don't say whether there was any bad intention, but it is unexplained; and nothing can illustrate the danger of such warrants which set Procurators-Fiscal loose on all correspondence, than that letters slumbering in a private desk should be got out, promulgated, or shown to the agent of the injured parties, who before were quite uninjured, for I doubt whether anything said by Bell about Mr Hungerjaw, to the poet, could injure these parties. The injury was in promulgating what was said. Now the defenders injudiciously showed these letters to Mr Nicholson, the agent of the Ballingalls—and that gave rise to all the actions of damages at their instance. I cannot but say that that was most injudicious.

The Court discharged the rule formerly granted, with the expenses of discussing it.

Agents for Pursuer—Murdoch, Boyd, & Henderson, W.S.

Agents for Defenders—Murray & Beith, W.S.

OUTER HOUSE.

(Before Lord Ormidale.)

SIMS *v.* HAWES.

Expenses—Tender. A tender of a sum with expenses up to the date of it, includes the expenses of consulting counsel as to whether it should be accepted and of taking decree.

In this case the defender lodged a minute, tendering a sum of thirty guineas of damages, "with expenses up to the date thereof." The pursuer in his account made various charges for consulting counsel as to the propriety of accepting this tender, and also charges for obtaining decree. These charges were sustained by the Auditor; and to-day the Lord Ordinary repelled the objections stated to them by the defender. It was maintained by the defender that although in the general case a tender with expenses of process carried such charges as these, still that, as the minute here was limited to its expenses up to its date, such charges could not be allowed.

Counsel for Pursuer—Millar. Agents—Morton, Whitehead, & Greig, W.S.

Counsel for Defender—Rutherfurd. Agents—W. H. & W. J. Sands, W.S.

Wednesday, June 6.

FIRST DIVISION.

A, *v.* B.

Act of Sederunt 15*th July* 1865—*Time for Lodging Issues.* A party having, in consequence of a miscalculation, failed to lodge issues till the day after they were due, the Court, of consent, on the report of the Lord Ordinary, allowed them to be received.

Lord BARCAPLE reported a point which had arisen in this case for instructions from the Court. By the 12th section of the Act of Sederunt of 15th July 1865, it is provided that—"All appointments for the lodging or adjusting of issues shall be held to be peremptory; and if the issue or issues be not lodged within the time appointed it shall be competent to the opposite party to enrol the cause, and to take decree by default—which decree by default shall not be opened up by consent of parties, but only on a reclaiming-note." In this case the pursuer had, by a miscalculation of the day upon which the period for lodging issues expired, failed to present them to the clerk to the process till the day following—when the clerk refused to receive them—but marked them as too late. The defender did not desire to take advantage of the mistake on the part of the pursuer's agent, and did not move for decree, but concurred with the pursuer in requesting the Lord Ordinary to report the matter to the Court for the purpose of obtaining leave to have the issues received.

The Court, in the circumstances, granted leave.

BREADALBANE'S TRUSTEES *v.* CAMPBELL.

Entail—Improvement Expenditure—10 *Geo. III. c.* 51—11 *and* 12 *Vict. c.* 36. An entailed proprietor having expended certain sums of money in improvements, and having taken proceedings under the Entail Amendment Act, whereby he obtained authority to grant a bond of annualrent over the lands to the extent of £25,000, which power he exercised to the extent of £20,000, after which he lived for four years, and died without exhausting the power, *held* (*diss.* Lord Deas) that his executors were not precluded from exercising the rights which they had under the Montgomery Act, in order to recover the remaining £5000 from the succeeding heir of entail.

Entail—Decree of Declarator—10 *Geo. III. c.* 6. Objections to decrees of declarator of improvement expenditure which repelled.

This was an action at the instance of the surviving accepting and acting trustees and executors

of the deceased John, second Marquess of Breadalbane, against John Alexander Gavin Campbell of Glenfalloch, heir of entail in the entailed lands and estate of Breadalbane. The summons concludes for payment (1) of the sum of £5202, 16s. 2¾d., being the balance of the sum of £25,202, 16s. 2¾d., contained in five decrees of declarator of entail improvements pronounced in favour of the said deceased John, second Marquess of Breadalbane; and (2) of the sum of £21,354, 16s., being three-fourths of the sum of £28,473, 1s. 4d. expended by the late Marquess in improvements upon the said lands and estate of Breadalbane, and contained in and due by a decree of declarator dated the 26th May 1855; and (3) of interest at the rate of five per cent. per annum of the said sums of £5202, 16s. 2¾d. and £21,354, 16s., from the date at which the right of the defender to the said entailed lands commenced until payment of the said respective sums.

By interim decree of the Lords of Council and Session, dated 17th July 1858 and 20th July 1859, in a petition and application presented by the said Marquess in virtue of the provisions of the Entail Amendment Act, 11 and 12 Vict., c. 36, their Lordships, of the date first mentioned, found that the petitioners obtained decrees of the Court, as specially mentioned in the petition, prior to the 14th August 1848, finding that he had expended on improvements on the entailed lands and estate of Breadalbane and others mentioned in the petition, of the nature contemplated by the Act 10 Geo. III., c. 51, sums amounting in all to £33,603, 15s. 2½d., and declaring three-fourths of the same, being in all £25,202, 16s. 2¾d., to be a debt against the heirs of entail who might succeed the petitioner in the said estate. They further found that the said sum of £33,603, 15s. 2½d. did not exceed the amount authorised by the statutes, and authorised the petitioner to grant a bond or bonds of annualrent, corresponding to the said sum of £25,202, 16s. 2¾d., over the said lands, or a portion thereof, or bonds and dispositions in security, one or more, charging the fee and rents of the said lands, or a portion thereof, with two-third parts of that sum, being £16,801, 17s. 6d., all in terms of the statute. Under authority of the foresaid decree, the said Marquess executed a bond of annualrent, dated the 12th, and recorded in the General Register of Sasines the 22d, July 1859, in favour of the Colonial Life Assurance Company for £20,000; and their Lordships, of second date of the said decree, approved of the said bond of annualrent, in favour of the Colonial Life Assurance Company, for annualrents effeiring to the sum of £20,000 part of the sums of £25,202, 16s. 2¾d., as executed. The balance of £5202, 16s. 2¾d., concluded for in the summons as remaining due under the five decrees of declarator referred to, was not borrowed, or bond granted therefor, under the authority of said interim decree, or otherwise, during the lifetime of the Marquess.

On the 15th June 1854 the late Marquess, as proprietor, and heir of entail in possession of the said lands and estate of Breadalbane, raised an action of declarator of entail improvements executed by him upon said lands in terms of the Act 10 Geo. III., c. 51, in which action final decree was pronounced upon the 26th May 1855. By this decree it was found and declared that between the terms of Martinmas 1840 and Martinmas 1852 there was expended for improvements upon the said lands in terms of and of the nature contemplated by that Act, sums amounting together to £28,473, 1s. 4d.; of which sum three-fourth parts, or £21,354, 16s., was declared to be a debt against succeeding heirs of entail; and the next heir entitled to succeed was decerned on his so succeeding to make payment to the heirs, executors, or assignees of the said Marquess of the said sum of £21,354, 16s., with interest from the period at which his right commenced, and in all time thereafter during the not-payment.

The total amount of the sums sought to be recovered in the present action was £26,557, 12s. 2¾d., with interest as above stated from the date at which the defender's right to the estate of Breadalbane commenced.

The pleas-in-law for the pursuers were:—

1. The pursuers, as surviving and accepting trustees and executors under the trust-disposition and settlement of the late Marquess of Breadalbane, and in virtue of the confirmation expede by them as executors aforesaid, are now in right of the various decrees of declarator libelled on in the summons.

2. The pursuers are not precluded from insisting for payment of the sums contained in the various decrees libelled, in respect of the petition and proceedings therein adopted by the late Marquess under the Act 11 and 12 Vict. c. 36, or by the fact of the late Marquess having partially exercised the faculty obtained by him under that application.

3. The whole claims originally competent to the late Marquess, or those in his right under the foresaid decrees, are still undischarged, and available to the pursuers, except to the extent thereof for which the bond of annualrent libelled was granted.

4. The decrees libelled being valid and effectual, and in conformity with the provisions of the Act 10 Geo. III., c. 51, and the whole pleas of the defender being unfounded, the pursuers are entitled to decree in terms of the conclusions of the libel, with expenses.

The pleas-in-law for the defender were:—

1. As the requisition made to the defender is not in the terms required by the statute 10 Geo. III., c. 51, the present action is incompetent, or at least premature.

2. Decree cannot competently be pronounced in this process until judgment is obtained in the defender's favour in the action between him and Lieutenant Campbell before mentioned.

3. In respect of the proceedings adopted by the late Marquess, in virtue of the 11 and 12 Vict. c. 36, and the authority granted to him under his said petition, and his acts and deeds under said authority, the pursuers, as his executors, have thereby been and are excluded from demanding from the defender payment of the alleged improvement debt, or any portion thereof, as concluded for in this action.

4. The granting of the said bond of annualrent by the late Marquess of Breadalbane operated as a discharge of all claims on account of the alleged improvements said to be contained in the first five decrees of declarator libelled on, save and except the claims under the said bond of annualrent itself.

5. The late Marquess of Breadalbane having availed himself of the provisions of the 11 and 12 Vict. c. 36, and, under the petition presented by him to the Court, obtained authority to charge his entailed estates, in virtue of said statute, for the alleged amount of improvement outlay of £25,202, 16s. 2¾d., must, to the extent to which he failed to avail himself of said authority, be held to have discharged, and has discharged, the defender, and the subsequent heirs of entail, of all claim for, or

in respect of, the sum of £5202, 16s. 2¾d. concluded for.

6. The late Marquess of Breadalbane having for upwards of four years failed to exercise the statutory power or faculty acquired and possessed by him, duriug this period, of charging his entailed estates for, or in respect of, the said sum of £5202, 16s. 2¾d., and having died without exercising said power, all claim on the part of the pursuers or others against the defender for or in respect of said sum, or any part thereof, has been thereby extinguished.

7. In any view the defender is not liable in payment of the said sum of £5202, 16s. 2¾d. to the pursuers, as concluded for, in respect that none of the pretended decrees of declarator mentioned in the 7th article of the defences is a valid or effectual decree of declarator in terms of the 10 Geo. III. c. 51.

8. As the alleged decree of declarator, dated 26th May 1855, is not a decree, and is an invalid decree, in conformity with the provisions of the 10 Geo. III. c. 51, the pursuers are not entitled to decree for payment of the said sum of £21,554, 16s., at least they are not entitled to such a decree under the conclusions of the present action.

9. On the assumption that the decrees of declarator founded on are valid and effectual decrees under the 10 Geo. III. c. 51, the present action is irrelevant and unnecessary.

10. By instituting the action of 2d March 1865 the pursuers must be held to have abandoned the present process, at least they are not entitled to plead the finality of the decrees libelled on; and the defender is entitled to urge, and to have effect given to, all objections to the alleged improvement expenditure referred to in these decrees, or any of them.

The Lord Ordinary (Ormidale) pronounced the following interlocutor, in which he found for the pursuers:—

Edinburgh, 14th November 1865.—The Lord Ordinary having heard counsel for the parties, and considered the argument and whole proceedings, Finds (1) that the pursuers, as the trustees and executors of the late Marquess of Breadalbane, are *in titulo* to sue the present action; (2) That the grounds of action have been sufficiently established; and (3) That the pleas stated by the defender on record, and maintained by him in defence to the action, are ill-founded: Therefore repels said pleas, and decerns in terms of the conclusions of the summons: Finds the pursuers entitled to the expenses of process incurred by them: Allows them to lodge an account thereof, and remits it when lodged to the Auditor to tax and report. R. MACFARLANE.

Note.—The title of the pursuers to sue the present action was not disputed. But the defender maintained that the action was in itself untenable, in respect of a variety of objections of a very critical and technical nature. These objections may be classed under two heads—1st, Those applicable to the former decrees of declarator libelled on; and 2d, Those subsequently arising, and therefore more especially applicable to the present action.

1. The objections to the validity of the former decrees libelled on are referred to in the Record in articles 7, 8, and 9 of the defender's statement, and are to the effect—(1) That the improvements constituted by the decrees are not said in the decrees to have been of the nature or character required by, and specified in, the statute 10 Geo. III. cap. 51; (2) That the decernitures in the decrees are contrary to, and inconsistent with, the provisions of the 10 Geo. III., cap. 51; and (3) That the decree of 26th May 1855, proceeds on the false assumption of the other decrees being valid, and that the outlay mentioned in them, as well as in the decree of 26th May 1855 itself, had not been *bona fide* expended in improvements authorised by the statute. In support of these allegations the defender has stated two pleas, the 7th and 8th.

The Lord Ordinary is of opinion that the objections thus recorded are ill-founded and wholly inadmissible as defences to the present action. It is impossible, he thinks, to read the exact decrees without being satisfied that the improvements were of the nature and character required by the statute 10 Geo. III., cap. 51, and that this is sufficiently set out in the decrees themselves. All of the decrees bear express reference to the statute, and obviously proceed in virtue and in terms of its provisions, and all of them, except the last, conclude with the statement, in so many words, that the whole matter was conform to the statute, and its requirements as regards intimations, accounts, and vouchers. As for their containing decernitures for the sums mentioned in them, the Lord Ordinary cannot hold that this is contrary to or inconsistent with the statute. No particular statutory provision was cited to that effect, and it was not explained how the decernitures referred to were calculated in the slightest degree to prejudice the defender. The Lord Ordinary could not therefore feel himself justified in holding the decrees to be null and invalid on any such ground; the more especially as he observes they are in conformity with the usual style—Juridical Styles, vol. iii., p. 202. Indeed, the whole of this matter appears to have been decided by the Court adversely to the defender's pleas in Cameron or Campbell, 7th December 1864, 3 Macpherson, 195.

In regard again to the objection that the improvements mentioned in the decrees are not of the nature sanctioned by the statute, it is plain that it cannot be entertained in existing circumstances, or as a defence to the present action. All the decrees became long ago final, in terms of the 26th section of the statute, and no reduction or other process of review has ever been brought of them. This of itself affords a complete answer to all objections to the decrees, unless indeed it could be shown that they were *ex facie* so irregular and incompetent as to require to be dealt with as wholly without the protection of the statute. The Lord Ordinary can see no ground for so dealing with the decrees, or any of them.

2. Even supposing the former decrees to be in themselves unchallengeable, the defender objects to their now being given effect to in the present action as concluded for by the pursuers, on the grounds referred to in his 1st, 2d, 3d, 4th, 5th, 6th, 9th, and 10th pleas in law. (1) The nature of the objections to the requisition on which the defender's first plea is founded is nowhere stated in the Record, the only reference to the matter being in his answer to the 22d article of the condescendence. But it was explained at the debate, that all that was meant by the objection was, that as the defender, on whom the requisition was made, was and is still only claiming to be heir to the late Marquess, the requisition upon him was made prematurely, or, at any rate, that it was premature to insist for decree. In truth, therefore, the objection, as so explained, amounts to nothing as regards the requisition and validity of the present action, especially keeping in view the defender's answer to art. 19 of the condescendence,

where he admits that he "is the heir of entail entitled to succeed to the entailed estates of Breadalbane, including the lands and estates mentioned, and that as such he has succeeded to and is in the possession of these estates, and of the rents and profits thereof;" and also keeping in view that the pursuers had, in terms of the 20th section of the Act, no alternative but to serve their requisition, and bring this action as they have done. (2) As to the incompetency of pronouncing decree against the defender till ultimate judgment of the Court of last resort has gone in his favour in the action betwixt him and Lieutenant Campbell, which is the effect of the defender's second plea, the Lord Ordinary has heard nothing in support of it to satisfy him that it is well-founded. Admittedly the defender is, and has been ever since the death of the late Marquess, in possession and receipt of the rents of the entailed estates, and he must have already drawn a great deal more than the sums now concluded for. Whether he may in the event of his ultimately failing in the litigation with Lieutenant Campbell, be entitled to relief in some way or other, of any sum he may be obliged to pay under the decree in the present action, is a question which cannot now be entered into. (3) The 3d, 4th, and 5th pleas of the defender are all very much to the same effect—viz., that the present action is excluded, and that the rights and claims now attempted to be enforced must be held to have been departed from by the proceedings of the late Marquess of Breadalbane under the 11th and 12th Victoria. cap. 36. But as no authority in support of this view was cited by the defender, and as the Lord Ordinary cannot discover anything in the statutes calculated to enforce it, he has felt himself bound to disregard it. Although the 11th and 12th of Vict., cap. 36, confers some new or additional remedies or heirs of entail, for working out and making available their improvement expenditure under the 10th Geo. III., cap. 51, it is nowhere provided that these new or additional remedies, if resorted to, although only to a certain extent, must be held to destroy and discharge the rights and remedies pre-existing under the 10th Geo. III., cap 51, in regard to that portion of improvement outlay which was never brought under the operation of the 11th and 12th Vict., cap. 36, and which remains unaffected by the proceedings adopted under that Act. Nor can the Lord Ordinary see any reason on general principles for coming to such a conclusion. (4) In regard to the defender's sixth plea, which is to the effect that because the late Marquess of Breadalbane did not himself for four years take any steps to charge the estate for the £5202, 16s. 2¾d. in question, the right to do so must be held to be extinguished, it may be sufficient to remark that no such prescription or limitation of the right, as founded on statute or otherwise, was said to exist, and the Lord Ordinary knows of none. (5) The defender's 9th and 10th pleas are obviously ill-founded. The former decrees, obtained as they were during the late Marquess of Breadalbane's life, could not possibly secure the object of the present, which is to obtain, in terms of the 20th section of the Act 10 Geo. III., c. 51, a decree which may be at once and directly enforced against the defender, as heir succeeding the Marquess in the entailed estates. And whatever effect the pronouncing of a decree in the present action may have on the pursuers' right to obtain a decree in the action recently brought, and referred to in the defender's 10th plea, the Lord Ordinary cannot understand how that action should operate as a bar to decree being pronounced in the present.

In regard to the matter of expenses, section 25 of the statute 10 Geo. III., c. 51, has made it imperative on the Lord Ordinary to award them to the pursuers who have been entirely successful in the litigation. R. M'F.

The defender reclaimed.

DUNCAN for him (the SOLICITOR-GENERAL and CLARK with him) argued—(1) That none of the first five decrees was an effectual or valid decree of declarator under the 6th section of the Montgomery Act, to the effect of excluding examination of the specific improvements, the alleged outlay on which was thereby constituted; and this in respect that none of these decrees contained a finding to the effect that the amounts of outlay therein stated were expended on improvements of the nature required by the statute: (2) that the decrees 1st, 3d, 4th, and 5th libelled on were invalid, in respect that all of these decrees founded upon and incorporated as part of them the relative accounts and vouchers lodged with the Sheriff-Clerk, and so made these accounts and vouchers part of said decrees. This being so, and various of the items of outlay therein contained having been expended as improvements which were not of the nature required by the statute, the decrees were *ex facie* bad decrees of constitution, and the plea of finality in their favour did not apply; (3) that as the late Marquess had had recourse to the provisions of the Entail Amendment Act, under which he had obtained the authority of the Court to charge the entailed estates in respect of the sum of £25,000, being the amount of improvement outlay contained in these five decrees; had exercised an authority only to the extent of £20,000, and obtained decree to this extent under a petition, which decree was not an *ad interim*, but a final decree, and after a survivance of four years from the date thereof, had died without attempting to charge the estates to the extent of the remaining £5000, he had thereby intended to discharge, and had discharged, the succeeding heir of entail of all liability in respect of said balance; and (4) that at all events the late Marquess having had recourse to the remedy provided by the Entail Amendment Acts, had thereby abandoned the remedy provided by the Montgomery Act, and so discharged the succeeding heirs of entail from all *personal* liability for payment of the said balance.—Stirling's Trustees *v.* Stirling, May 23, 1862, 24 D. 993; Sir P. Murray, 18th June 1850, 13 D. 41; Breadalbane's Trustees *v.* Buckingham, 26th May 1842, 4 D. 1259; Robertson, 10th June 1864, 2 M'Ph. 1178; Elliot, 24th May 1861, 23 D. 882.

WATSON (with him PATTON) answered—(1 and 2) The summonses and decrees were in the form usually adopted, and that given in the Juridicial Styles, vol. iii.; (3) The fact that the Marquess had had recourse to the provisions of the Entail Amendment Acts with reference to a part of the sum with which he was entitled to charge the succeeding heirs, did not preclude him from falling back on the rights which he had under the Montgomery Act with regard to the remainder; (4) By section 19 of the Entail Amendment Act it was only when a bond of annualrent, or bond and disposition in security, had been granted that the succeeding heir of entail was discharged from *personal* liability to pay this sum.

At advising,

The LORD PRESIDENT—This is an action at the instance of the trustees of the late Marquess of Breadalbane against John Alexander Gavin Campbell of

Glenfalloch, as heir of entail in the entailed lands and estates of Breadalbane; and the point in dispute between the parties is, whether the pursuers of this action are entitled to have the provisions of the Act 10 Geo. III., c. 51, put in operation as regards certain entail improvements amounting altogether to about £50,000. Objections of various kinds have been stated to this, and these were of two kinds:—(1) That the decrees which had been obtained by the late Marquess under the provisions of the Montgomery Act were not valid —that they did not validly constitute the sum claimed as debts against the next heir; and (2) that the effect of the decree obtained by him was to put an end to his claim against the estate. In regard to the first class of objections, these were of various kinds. There was an objection that the summons did not aver that the improvements were made in terms of the Montgomery Act and such like. After all the consideration I have given to the subject I cannot say that I am disposed to give any effect to this at all. It appears to me sufficient that they are to give effect to proceedings substantially had under the Montgomery Act, and the decree recognises them as such. The second objection appeared to me to be a much more serious one, and to resolve more into a matter of principle than the other; and that is whether the proceedings under the Entail Amendment Act have or have not the effect contended for by the defenders. On that subject the defender has maintained various pleas. His third plea in law is founded on the fact that the late Marquess had obtained authority, under the provisions of the Act 11 and 12 Vict., c. 36, to grant a bond of annuity, or a bond and disposition in security in conformity with the provisions of that Act, and that he had exercised that power to a large extent. Out of £25,000, which was the largest extent to which he could exercise it, he had done so to the amount of £20,000. And it is contended that he is not now entitled to enforce the provisions of this Act except to the amount of the bond in question. This plea, and the 3d, 4th, 5th, 6th, and 7th following, raise a question of considerable importance; namely, whether, when an heir of entail has executed improvements and obtained decree under the Entail Amendment Act, he can avail himself of the Montgomery Act; whether, when he has applied to the Court for the purpose of availing himself of these provisions and obtained authority, he is precluded from exercising rights which he had under the Montgomery Act. It does not appear to me that that doctrine can be pressed to that extent. If the late Marquess had not exercised any of the powers conferred on him by the statute, it does not appear to me that he would be precluded from exercising rights which he had under the Montgomery Act. The Montgomery Act provides that an heir who lays out money on improvements is the creditor of succeeding heirs. The Entail Amendment Act supplies provisions which are for the further benefit of the heir—putting him in the position that he can go into the market and obtain money on favourable terms on bond of annuity or bond and disposition in security. He cannot exercise that power without the authority of the Court; and if he does not avail himself of the provisions of the Act—if he cannot find parties to lend him money —I do not understand that he ceases to have the rights conferred on him by 10 Geo. III., c. 51. I therefore think that although a party has obtained the authority of the Court in order to avail himself of the Entail Amendment Act, he has not thereby extinguished the right which he had under the Montgomery Act. I think this is further clear from the 19th section of the Entail Amendment Act, which provides that the granting of the bond of annualrent, or of the bond and disposition in security, shall operate a discharge of all claims for or on account of the improvements of the estate, save and except the claims under such bond of annualrent or bond and disposition in security themselves. But then there is a further matter to be considered. The late Marquess not only obtained decree authorising him to avail himself of the provisions of the Entail Amendment Act, by granting a bond or bonds, but he proceeded to act on this. He availed himself of it to a certain extent; and then the question arises whether, having done so, he had not betaken himself to that mode of reimbursing himself for that expenditure, and thereby abandoned the rights which the Montgomery Act gave him. The question comes to be whether he is not now limited to the course which the Entail Amendment Act gives. The defender here maintains that not having proceeded to the full extent of the powers given him by the decree, having only granted bonds to the extent of £20,000, he is precluded from the use of the remedy of the Montgomery Act as to the remainder. Having lived for four years, without charging the entailed estate with the remainder, his executors are cut out of the benefit of it. I cannot understand this to be the meaning of the Act. That would require to be worked out with more proof that the Marquess had discharged his rights. If he had found persons ready to lend him some of the money, but not all, did he thereby lose the rights which he had in any course of procedure as to the remainder? I think certainly not. But then there is the further question. Although he may not have lost that remedy as to the remaining £5000, is it not his duty to follow it by the remedies which the Entail Amendment Act gives. The Entail Amendment Act (sec. 15) authorises the executors of one who has executed improvements over the entailed estate, and has died without executing a bond of annualrent, to obtain from his successor, the heir then in possession, a bond of annualrent. And the question is, whether it is now the duty of the executors to follow out that remedy, or to follow the remedies provided by the Montgomery Act. On that point I have formed the opinion that the party who has availed himself of the powers given under the Entail Amendment Act can only be limited to that remedy to the extent to which he has exercised it, and that the remainder which he has not placed on that footing just remains what it was before—a debt in which he is the creditor of the succeeding heir of entail under 10 Geo. III., c. 51. I think the Montgomery Act still remains in full operation, in so far as he has not excluded its effect, by taking advantage of the provisions of the Entail Amendment Act.

Lord CURRIEHILL.—The first question is whether the decrees of declarator are defective in point of form. It is said that they are not in terms of the 10 Geo. III., c. 51, because they don't describe the operations in respect of which they are to be presumed to be consistent with the claim for improvments allowed by that Act. I think there is no requirement that the decree should set forth more than is set forth in the decrees in question. Section 26 sets forth the requirements of decrees, and it only requires that in order to prevent questions as to the amount of the sums expended upon improvements there should be proper evidence

that they have been so expended. I think we have that here. The next question is of more importance, and it is whether or not a balance of the sum for which the decree has been pronounced has been extinguished as a debt against the heir of entail, or against the rents of the entailed estates. Now we must see what was the position of parties before these proceedings took place which are said to have operated extinction. The Montgomery Act renders the Marquess of Breadalbane a creditor upon the subsequent heir of entail for sums amounting to £25,000. The remedies which he was entitled to, consisted, first, in a personal right to enforce payment of the whole sum from the next heir of entail, and he was entitled to use all diligence, real and personal, to enforce that claim; he was also entitled to attach the rents of the entailed estate. The next heir of entail was entitled to meet such demand by offering to make over one-third of the rents of the entailed estate to the creditor, and the creditor was to make his claim effectual over that part. That was the state of matters so long as the claim remained under 10 Geo. III., c. 51. But the creditor availed himself of another remedy provided by the Entail Amendment Act. That remedy consisted in his being entitled, by decree of this Court, to create a real burden by means of a bond of annualrent to a certain amount, being three-fourths of the sum laid out upon improvements, in terms of the decree. That was one remedy. Another was, that instead of a bond of annualrent, he was entitled to grant a bond of disposition in security over the fee of the estate, for a sum equal to two-thirds of the proportion of three-fourths which he was entitled to charge against the estate under the Montgomery Act. He applied for and obtained power to adopt either of these two remedies. The Court interponed their authority, and authorised the Marquess to grant a bond or bonds of annualrent corresponding to the said sum of £25,202, 16s. 2¾d., over the entailed lands, or a portion thereof, or bonds and dispositions in security, one or more, charging the fee and rents of the said lands, or a portion thereof, with two-third parts of that sum, being £16,801, 17s. 6d. What was the position of the party who obtained this power? He had obtained power of creating one or other of these burdens upon the entailed estate; but so long as he did not exercise that power did he lose his remedy against the heir of entail personally, and against the rents of the entailed estate under 10 Geo. III. I see nothing in the Act to that effect. I see no principle to lead to that conclusion. The creditor obtained power of doing certain things, but so long as he did not exercise that power, the rights he had before remained unchanged. If he had lost his previous remedy, I should like to know what he could have done. He could not draw annualrent—he had no authority for that. He could not have obtained payment of a single farthing of the rent. But he did exercise the power to the extent of some part of that debt which is set forth in the decree I spoke of. He exercised that power by granting a bond of annualrent in favour of the party who advanced him money. The effect of that was to extinguish his right, under the Montgomery Act, as to that part of the debt as to which he had exercised his right. That is not matter of inference, but matter of statute. But as to the remaining £5000, what has occurred to change the position either of the debtor or the creditor? The powers granted by the Entail Amendment Act have not been exercised. No bond of annualrent, no bond and disposition in security, has been granted. Section 19 does not, therefore apply to it; and this being so, I can see nothing to affect the right of the creditor under the previous Montgomery Act. The position of the next heir has been immensely improved by these proceedings. He can no longer be called upon to pay the sum, either principal or interest, under the Montgomery Act. Until that bond was granted he was liable to pay £25,000. He is now discharged to the extent of £20,000. He is not obliged to put his hand into his pocket as to that. But as to the remaining £5000, he is just as he was. The creditor may call upon him to pay that. But he may still assign one-third of his rents to pay this. Now that being the case, I can't see what defence there is against this action. It is said that having begun with one remedy, his claim under the Montgomery Act is extinguished, and he cannot take a different remedy. But the question is, is the claim against the next heir of entail extinguished—is that personal obligation against him extinguished? I just ask what is extinguished? The Entail Amendment Act does not provide for the extinction of such a claim in any way whatever, except by granting a bond of annualrent or a bond and disposition in security. Neither of these has been done with regard to the £5000.

Lord DEAS—I agree in thinking that the decrees which were obtained under the Montgomery Act are not objectionable on any of the grounds which have been stated. And I am of opinion that these decrees are final. In the first place, I think they are in the form required by the Act, and being so, they are now final. They were obtained in an action in which the other heirs of entail interested were called as parties, and entitled to appear for their interest. The next question regards the effect of the proceedings under the petition presented by the late Marquess of Breadalbane in 1858, for authority to grant a bond or bonds of annualrent for certain advances of money, in terms of the Entail Amendment Act. I am of opinion with your Lordships that the effect of these proceedings is not to take away all remedy competent to the executors of the Marquess for that £5000. But I think there is a question of great difficulty and delicacy, whether the effect of these proceedings is not to limit them to the remedies prescribed by the Entail Amendment Act, which are twofold—viz., a bond of annualrent and bond and disposition in security. I am rather disposed to think it is not now open to these executors to take any other remedy than that appointed by the Entail Amendment Act. I have no doubt whatever that that remedy is open. I have no doubt that they have not lost the right to claim the £5000. But I am disposed to think that they must do so by the Entail Amendment Act. It is quite true that by section 19 of that Act, when once a bond is granted, it is to operate a discharge. The bond then comes in place of any other claim for the money. But I don't think it necessarily follows from that that the heir who has made improvements may not have exercised his option of taking the remedy prescribed by the Entail Amendment Act, and may thus be prevented from going back upon the Montgomery Act. It is not that the claim is discharged. The claim is not discharged. There is nothing inconsistent in holding that the claim is not discharged, but that the heir is confined to a certain remedy. Now, the statement in the petition which the late Marquess presented to the Court, and in which he set forth all the decrees he had obtained, bore that the petitioner is desirous

of availing himself of the provisions of the beforementioned statutes 11 and 12 Vict., c. 36, and 16 and 17 Vict. c. 94, and particularly of the provisions contained in the 13th and 18th sections of the said 11 and 12 Vict., c. 36, by granting a bond of annualrent, or a bond and disposition in security, and then he prays for authority of the Court to authorise him to grant either the bond of annualrent or the bond and disposition in security. That, like all the proceedings under this Act, is a judicial proceeding in which next heirs are called for their interest, and the Act provides further, that any person interested may appear and object. He calls all those parties into Court, upon the statement that these are the remedies of which he is to avail himself; and then he gets decree of Court, by which the Court interposes its authority, and authorises him to grant the bond of annualrent, or bond and disposition in security. I have no doubt that after obtaining that authority to grant the bond, it was competent for the Marquess to go back to the Court and get authority to grant another bond for the remaining £5000. The question is whether he had not exercised his option, and limited himself to the remedy introduced by the Entail Amendment Act, or whether that remedy was cumulative with that already provided by the Montgomery Act. It is a question of construction of the statute, and I have great difficulty in taking the view that it is cumulative. I suppose that when heirs of entail are called into the field in this way they are no longer to be held liable to be called upon to pay the sum. They are entitled to make their arrangements and provisions for their children, upon the footing that they should not be called upon to pay that money. I am disposed to think this is a matter judicially settled amongst those parties. I think there is no doubt that the Entail Amendment Act was made for the benefit of the heir who made the improvements; but it was also made, and largely made, for the benefit of the heirs who are to succeed. Does not the very circumstance that, by granting this bond, the heir making improvements gives great relief to those who are to succeed, just suggest the question, whether the object of the Legislature was not to give that advantage, and whether the next heir was not entitled to hold it as a settled matter, that the other portion of the money was to be dealt with in the same way?

Lord ARDMILLAN—I am of opinion that the objections taken to the terms of these decrees are not well founded. On the other question, although I was very much struck with the views of Lord Deas, I have come to be of opinion that this is the true remedy, and a remedy which is quite legitimate. I think there is no doubt that the Act 10 Geo. III., c. 51, constitutes the heir of entail who makes these improvements a creditor, and that he has not only in law a right and claim as creditor, but a right to use diligence under the Montgomery Act, in order to make his claim effectual. The question is, what has discharged his claim as creditor, and what has discharged his rights under 10 Geo. III., c. 51, to make it available. Since by 10 Geo. III. he has both these rights, I have no doubt that the mere passing of the Entail Amendment Act did not affect either his claim as creditor or his right to enforce it. It is not an Act creating a new or substituted remedy—it creates an additional remedy. In the next place, I think that when procedure under the Entail Amendment Act is taken, it is not necessary that it should be conducted throughout under that Act to the exclusion of other remedies. I think the party who has obtained decree under the Entail Amendment Act is entitled to grant either a bond of annualrent or to grant a bond and disposition in security. I do not think that when he proceeds to grant the one he in the least cuts himself out from the power of granting the other. I think, also, that he might grant a succession of bonds of annualrent, or of bonds and dispositions in security; and I think that the only discharge of the claims which the heir making the outlay has, is not the judgment of the Court allowing him to grant the bond, not the granting of one bond, and starting upon a course of proceeding under the Entail Amendment Act, but is the bond itself, and I hold that to mean the bond according to its measure. It discharges *pro tanto* the claim of the heir who gets decree. Upon looking to the decree itself, I think this comes out plainly. The petitioner prays for "authority to execute bond or bonds of annualrent, or bond or bonds and dispositions in security for entail improvements over the said entailed estates, to the effect hereinafter expressed." And then the decree sets forth that the sums expended by him on improvements of the kind contemplated by the Montgomery Act amount to £33,603, 15s. 2¾d.; that three-fourths of these are £25,202, 16s. 2¾d.; and that this last sum is declared to be a debt against the succeeding heirs of entail in the estate. The decree then proceeds to interpone the authority of the Court, and to authorise the petitioner "to grant a bond or bonds of annualrent corresponding to the said sum of £25,202, 16s. 2¾d. over the said lands, or a portion thereof, or bonds and dispositions in security, one or more, charging the fees and rents of the said lands, or a portion thereof, with two third parts of that sum, being £16,801, 17s. 6d.—*all in terms of the statute.*" That includes the 19th section of the Act, and that 19th section declares that the claim of the heir who has made the outlay is discharged by granting the bond. The phrase "to the effect hereinafter expressed," I read to mean to the effect of extinguishing the debt to the amount of the bond. When you come to the particular bond which is granted and approved of by the Court, the words in which the Court approve of it are to be considered. The decree states that the Court approve of the bond of annualrent No. 57 of process, in favour of the Colonial Life Assurance Company, for annualrents effeiring to the sum of £20,000, part of the sum of £25,202, 16s. 2¾d., as executed. That amounts to a declaration that the decree remains available for everything beyond the £20,000, which is designated as part of the £25,000.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Agents for Pursuers—Davidson & Syme, W.S.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

BREADALBANE'S TRUSTEES *v.* CAMPBELL.

Entail—Improvement Expenditure—10 *Geo. III., cap.* 51, *sec.* 12. Held (alt. Lord Ormidale) that the executors of an heir of entail, who had expended certain sums of money in improvements, were entitled to recover the statutory portion thereof from the succeeding heir of entail, although the account of the sums expended during the twelve months preceding the term of Martinmas were not subscribed by the expending heir within four months after the term, this having become impossible by reason of his death three days before it. Held further, that the proper parties to sub-